

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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KENNETH FRIEDMAN, #80952,

Plaintiff(s),

v.

LINDA ADAMS, et al.,

Defendant(s).

Case No. 2:13-CV-1345 JCM (CWH)

ORDER

Presently before the court is defendants Dr. Robert Bannister, Dr. Joseph Hanson, Linda Adams, and Doni K. Jennings's motion for summary judgment. (ECF No. 62). Plaintiff Kenneth Friedman filed a response.<sup>1</sup> (ECF No. 70). Defendants filed a reply. (ECF No. 72).

Defendants also move for leave to file medical records under seal in support of defendant's motion for summary judgment. (ECF No. 63). Plaintiff filed a response. (ECF No. 68). Defendants filed a reply. (ECF No. 71).

As an initial matter, plaintiff names state officials as defendants in their official capacity. (ECF No. 1-1). The Eleventh Amendment protects state officials acting in their official capacities against § 1983 suits for financial damages. *Hale v. State of Ariz.*, 993 F.2d 1387, 1399 (9th Cir. 1993). Section 1983 does not amount to a congressional abrogation of their immunity because state officials acting in "their official capacity are not 'persons' within the meaning of § 1983." *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003) (citing *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997)). Thus, to the extent that plaintiff seeks damages against

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<sup>1</sup> Plaintiff also filed motion for extension of time to respond. (ECF No. 69). Because he filed a timely response anyway, the motion is denied as moot.

1 defendants in their official capacities, the court finds dismissal appropriate. 42 U.S.C. § 1997e.  
2 The court will analyze plaintiff's Eighth Amendment claims for declaratory relief.

3 **I. Background**

4 This is a civil rights action stemming from a dispute over dental care, or the alleged lack  
5 thereof, provided to a prisoner. Plaintiff is incarcerated at the Nevada Department of Corrections.  
6 (ECF No 1-2). Defendant Dr. Bannister is the former director of medical for the Nevada  
7 Department of Corrections. (ECF No. 62). Dr. Hanson is an institutional dentist at the prison and  
8 saw plaintiff as a patient. (ECF No. 62). Adams is a correctional nurse at the prison. (*Id.*). Jennings  
9 is the director of nursing services at the prison. (*Id.*).

10 The pain and desired medical treatment began May 6, 2012, when plaintiff submitted a  
11 written medial request form ("kite") stating his "tooth needs pulled, think its abscessing. Ibuprofen  
12 is doing little good. Can't eat well. Please set appointment and advise me A.S.A.P.," to which a  
13 response was provided stating "when your name comes up on the list, we'll see you." (ECF NO.  
14 62-4, 5). Plaintiff was then provided an ibuprofen pain pack on May 6 after being seen by a sick  
15 call nurse. (ECF No. 62-6 at 2).

16 On May 13, 2012, plaintiff filed an informal level grievance complaining of the pain. (ECF  
17 No. 62-7). Soon after, plaintiff submitted a medical kite complaining of more pain and asking for  
18 more pain medication. (ECF N. 62-7). Plaintiff received a response stating the dentist will see him  
19 when his name comes up. (*Id.*). Plaintiff was then provided another pain pack on May 17, 2012,  
20 after being seen again by a sick call nurse. (ECF No. 62-6 at 2).

21 Plaintiff was seen by Dr. Hanson on May 21, 2012. (ECF No. 62-3). During this time, a  
22 tooth was extracted, three weeks after his initial kite. (*Id.*). Plaintiff's pain persisted, so he  
23 requested another dentist visit, and Dr. Hanson informed plaintiff that he would be seen on a first-  
24 kite-first-serve basis. (ECF No. 62-8).

25 On May 30, 2012, plaintiff submitted a kite indicating that the problem was getting worse  
26 and he needed another tooth pulled. (ECF No. 62). Again, Dr. Hanson responded that he would be  
27 seen when his name comes up. (ECF No. 62). Plaintiff was seen July 9, 2012. (*Id.*).  
28

1 Plaintiff submitted another medical kite for a dental appointment July 24, 2012. (ECF No.  
 2 62-12). Soon after, the current action was filed. Plaintiff filed suit in state court, and the case was  
 3 removed to this court. (ECF No. 1). Plaintiff's only remaining claim alleges deliberate  
 4 indifference, a civil rights violation under the Eighth Amendment and 42 U.S.C. § 1983. Plaintiff  
 5 seeks declaratory relief.

## 6 **II. Legal Standard**

7 The Federal Rules of Civil Procedure provide for summary adjudication when the  
 8 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
 9 affidavits, if any, show that "there is no genuine issue as to any material fact and that the movant  
 10 is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary  
 11 judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477  
 12 U.S. 317, 323–24 (1986).

13 In determining summary judgment, a court applies a burden-shifting analysis. "When the  
 14 party moving for summary judgment would bear the burden of proof at trial, it must come forward  
 15 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at  
 16 trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine  
 17 issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests.,*  
 18 *Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

19 In contrast, when the nonmoving party bears the burden of proving the claim or defense,  
 20 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
 21 element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed  
 22 to make a showing sufficient to establish an element essential to that party's case on which that  
 23 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving  
 24 party fails to meet its initial burden, summary judgment must be denied and the court need not  
 25 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60  
 26 (1970).

27 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
 28 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*

1 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing  
 2 party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
 3 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions  
 4 of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th  
 5 Cir. 1987).

6 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
 7 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
 8 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
 9 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
 10 for trial. *See Celotex Corp.*, 477 U.S. at 324.

11 At summary judgment, a court’s function is not to weigh the evidence and determine the  
 12 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*  
 13 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all justifiable  
 14 inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is  
 15 merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at  
 16 249–50.

### 17 **III. Discussion**

#### 18 *a. Failure to exhaust administrative remedies*

19 Defendants argue that plaintiff failed to exhaust administrative remedies because, in their  
 20 opinion, the specificity of plaintiff’s grievance evolved at each step of the process. (ECF No. 62).  
 21 Plaintiff responds that his grievance sufficiently notified the prison of his problem and that the  
 22 defendants’ stance would severely restricts a prisoner’s ability to finish the grievance process.  
 23 (ECF No. 70).

24 The Prison Litigation Reform Act (“PLRA”) requires that inmates fully exhaust grievance  
 25 opportunities through the prison’s administrative process before filing an action. 42 U.S.C. §  
 26 1997e(a). The administrative remedies a prisoner must exhaust are defined by the prison grievance  
 27 process itself, not the PLRA. *Jones v. Bock*, 549 U.S. 199, 218 (2007)

1 Nevada's formal inmate grievance process has three levels. NEV. DEP'T OF  
2 CORRECTIONS ADMIN. REG.: INMATE GRIEVANCE PROCEDURE, ADR 740. Each level  
3 requires that the inmate clearly detail the claim and remedy sought. *Id.*

4 The process requires an inmate to first file an informal grievance after failing to resolve the  
5 issue outside of the prison process. *Id.* at 740.04. The inspector general's office has ninety days to  
6 respond. *Id.* Second, an inmate must file a first-level grievance. *Id.* at 740.05. The warden must  
7 respond within forty-five days. *Id.* at 740.06.

8 Third, an inmate must file a second-level grievance. *Id.* at 740.07. The warden must respond  
9 to a second-level grievance within sixty days. *Id.* A prisoner has exhausted his administrative  
10 remedies only after he has completed the three-level grievance process. *Id.*

11 Failure to exhaust administrative remedies is an affirmative defense under the PLRA.  
12 *Jones*, 549 U.S. at 216. Exhaustion must occur prior to filing suit, not during the suit's pendency.  
13 *McKinney v. Carey*, 311 F.3d 1198, 1999-1201 (9th Cir. 2002). Additionally, NRS 41.0322  
14 requires prison inmates exhaust their administrative remedies prior to filing suit, which, pursuant  
15 to NRS 209. 243, must be filed within six months of the date of the alleged injury. *Id.*

16 There is no dispute that plaintiff completed the grievance process before filing his claim in  
17 district court. (ECF No. 62-6). Instead, the issue is whether plaintiff properly expressed his  
18 grievances at each stage of the grievance process. The attorney general requests too much of a  
19 pleading plaintiff. At the informal grievance level, plaintiff pleads that there are "delays in  
20 medical/dental care" while he is in "excruciating pain" from his molar. *Id.* He then claims the lack  
21 of attention is "below community standards for prompt medical" treatment. *Id.* In plaintiff's first-  
22 level grievance, he claims the problem is "ongoing," "chronic," and "urgent" and requests  
23 immediate medical attention for the problem. *Id.* In plaintiff's second-level grievance, he claims  
24 "the response unreasonably fails to address his pain and agony" and that there is "deliberate  
25 indifference" from the prison. *Id.*

26 While the grievance does not expressly state the elements of the cause of action plaintiff  
27 would eventually claim, it clearly alleges that there is an unreasonable delay in medical care that  
28 is below community standards and results in pain. The court finds that plaintiff properly exhausted

1 his administrative remedies under the PLRA. The court now considers whether summary  
2 judgement is appropriate on the issues of material fact.

3 *b. Summary judgement*

4 Defendant argues that (1) plaintiff did not have a serious medical need, (2) defendants were  
5 not deliberately indifferent to plaintiff, and (3) defendant's delay in response to plaintiff was  
6 reasonable. (ECF No. 62). Plaintiff responds that (1) his dental harm constituted serious harm and  
7 he suffered additional serious harm because treatment was delayed, and (2) he attempted to get  
8 emergency care. (ECF No. 70).

9 In order to survive a motion for summary judgment based on a deliberate indifference to  
10 serious medical needs under the Eighth Amendment, a plaintiff must present evidence that a  
11 reasonable jury would conclude shows the defendant official knew of and disregarded an excessive  
12 risk to inmate health or safety. *See, e.g., Simmons v. Navajo County*, 609 F.3d 1011, 1017-18 (9th  
13 Cir. 2010). The official must be aware of the facts from which the inference of an excessive risk  
14 to inmate health or safety could be drawn and must draw the inference. *Id.*

15 The medical official must be "(a) subjectively aware of the serious medical need and (b)  
16 fail to adequately respond." *Id.* (quoting prior authority, with emphasis in original). Medical  
17 misdiagnosis, differences in medical opinion, medical malpractice, and negligence do not amount  
18 to deliberate indifference. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd*  
19 *on other grounds, WMX Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.1997)(*en banc*); *Sanchez v.*  
20 *Vild*, 891 F.2d 240, 241-42 (9<sup>th</sup> Cir. 1989). Prison authorities have wide discretion regarding the  
21 nature and extent of medical treatment provided to prisoners. *See Snow v. Gladden*, 338 F.2d 999  
22 (9th Cir. 1964) (citing *Weller v. Dickson*, 314 F.2d 598, 602 (9th Cir. 1963)).

23 The crux of the complaint revolves around a disagreement regarding the dental treatment  
24 provided to plaintiff. Before his scheduled appointment, plaintiff was seen multiple times by the  
25 nurse, who prescribed medication when he notified the prison that he was in pain. (ECF No. 70).  
26 He was later seen multiple times by Dr. Hanson at scheduled appointments. Plaintiff contends that  
27 the approximately three-week delay between his complaints of severe pain and the scheduled  
28

1 appointment at which his tooth was eventually removed constitutes deliberate indifference. (ECF  
2 No. 70).

3 The court turns first to whether the prison officials knew of a serious harm and deliberately  
4 did nothing. While plaintiff kited multiple times about his tooth pain and the medication not being  
5 effective, he was seen by Dr. Hanson less than three weeks after his first kiting. (ECF No. 62-3-  
6 4). Before being seen by the doctor, plaintiff was given multiple medical packs for pain and visited  
7 by a prison nurse twice. (ECF No. 62-6 at 2). At most, plaintiff has shown that he had a different  
8 dental opinion regarding his treatment than Dr. Hansen. The evidence demonstrates that plaintiff  
9 was receiving ongoing care for his dental health. (ECF No. 62-7).

10 Plaintiff does not present evidence that the decision to deny him faster treatment was based  
11 on anything other than the doctor's medical judgment. This difference of opinion regarding the  
12 appropriate course of treatment does not amount to a deliberate indifference to serious medical  
13 needs, and plaintiff's claim fails as a matter of law. See *Sanchez*, 891 F.2d at 242. There is no  
14 genuine issue with respect to the fact that defendant did not disregard a health risk with respect to  
15 plaintiff. Instead, the evidence shows that defendants responded to and diagnosed plaintiff's health  
16 needs.

17 Accordingly, the court does not address whether plaintiff suffered serious medical harm.  
18 Because plaintiff cannot show that his health risk was disregarded, summary judgment will be  
19 entered on behalf of defendants. The court notes, however, that routine discomfort does not satisfy  
20 the objective pain requirement of deliberate indifference. See *Johnson v. Lewis*, 217 F.3d 726, 731  
21 (9th Cir. 2000).

22 Plaintiff also requests extended discovery time in his motion for summary judgment  
23 response. (ECF No. 70). In accordance with Local Rule IC 2-2(b), the court will not consider  
24 plaintiff's motion because it is improperly filed. See LR IC 2-2(b) ("For each type of relief  
25 requested or purpose of the document, a separate document must be filed and a separate event must  
26 be selected for that document.").

27 The court now considers plaintiff's motion for leave to file medical records under seal.  
28 (ECF No. 63). Plaintiff opposes the motion to seal because he thinks he will not be able to see his

1 own medical records. (ECF No 70). The need to protect sensitive medical information is a  
2 compelling reason to seal records. *San Ramon Reg'l Med. Ctr., Inc. v. Principal Life Ins. Co.*, C  
3 10-02258 SBA, 2011 WL 89931, at \*1, n.1 (N.D. Cal. Jan 10, 2011). Plaintiff will not be  
4 prejudiced, as a copy of the exhibits filed under seal was sent to the warden's office at Ely State  
5 Prison for his review. (See ECF No. 63 at 2). That being the case, in the interest of protecting  
6 sensitive medical information, defendant's motion for leave to file medical records under seal is  
7 granted.

8 **IV. Conclusion**

9 Accordingly,

10 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant State of  
11 Nevada's motion for summary judgment (ECF No. 62) be, and the same hereby, is GRANTED.

12 IT IS FURTHER ORDERED that defendant's motion for leave to leave to file medical  
13 records under seal (ECF No. 63) be, and the same hereby, is GRANTED.

14 IT IS FURTHER ORDERD that plaintiff's motion to extend time to respond (ECF No. 69)  
15 be, and the same hereby, is DENIED as moot.

16 The clerk shall enter judgment for defendants and close the case.

17 DATED August 1, 2016.

18   
19 UNITED STATES DISTRICT JUDGE